



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JUN 21 2018

The Honorable Marcellus Osceola, Jr.
Chairman
Seminole Tribe of Florida
6300 Stirling Road
Hollywood, Florida 33024

Subject: EPA's Approval of the State of Florida's revised Water Quality Standards for Phosphorus within the Everglades Protection Area

Dear Chairman Osceola:

The U.S. Environmental Protection Agency, Region 4, has completed its review of the State of Florida's final adopted rules for Water Quality Standards for Phosphorus within the Everglades Protection Area. On June 1, 2017, the Florida Department of Environmental Protection submitted its final adopted rule revisions contained in 62-302.540, F.A.C.¹ to the EPA for review. The revisions are intended to conform Rule 62-302.540, F.A.C. with 40 CFR § 131.44(a). The EPA adopted 40 C.F.R. § 131.44(a), which codified into federal rule the EPA's previous disapproval of various Everglades Phosphorus Rule provisions. The revisions also include language regarding water quality based effluent limitations being used to determine compliance with the phosphorus criteria for dischargers.

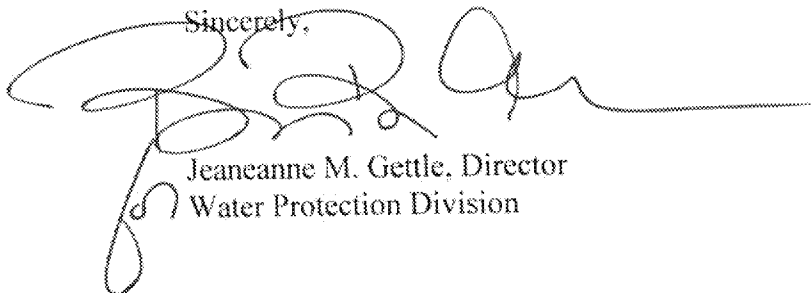
In a letter dated March 15, 2018, the EPA formally extended an offer of consultation to the Seminole Tribe of Florida. The consultation and coordination process was conducted in accordance with the EPA's Consultation Policy www.epa.gov/tribal/consultation/consult-policy.htm. The process began on March 15, 2018, and ended on April 16, 2018. Although Seminole Tribe of Florida did not elect to consult on the EPA's action, we would like to share our final decision with you. Based on our review of the materials provided in support of the State's revisions, the EPA approved the revisions in 62-302.540, F.A.C. on April 30, 2018. A Decision Document summarizing the EPA's review and the bases for the Agency's decisions is enclosed.

This letter closes out the formal consultation and coordination process that was offered on March 15, 2018, and ended on April 16, 2018. As always, the EPA appreciates your consideration of this important matter and looks forward to future opportunities to work with the Seminole Tribe of Florida on a government-to-government basis.

¹ Florida Administrative Code

Should you have any questions regarding this consultation, please do not hesitate to call me at 404-562-9345 or have a member of your staff contact Dr. Katherine Snyder of my staff at 404-562-9840.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Gettle', with a long horizontal flourish extending to the right.

Jeaneanne M. Gettle, Director
Water Protection Division

Enclosure

cc: Ms. Cherise Maples, Director (electronic copy only)
Ms. Lisa Meday, EPSIII (electronic copy only)
Environmental Resource Management Department



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

APR 30 2018

Mr. Tom Frick
Director
Division of Environmental Assessment and Restoration
Florida Department of Environmental Protection
Mail Station 3000
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

Dear Mr. Frick:

The United States Environmental Protection Agency has completed its review of the amendments to Rule 62-302.540, Florida Administrative Code (F.A.C.). On June 21, 2017 the EPA received a letter from Frederick L. Aschauer, Jr., General Counsel of Florida Department of Environmental Protection to Ms. Anne Heard, Acting Regional Administrator, U.S. EPA Region 4, dated June 1, 2017 certifying that the amendments were duly adopted pursuant to state law.

As laid out in the enclosed decision document, titled *Decision Document of the United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act Review of Florida's Amended Rule 62-302.540*, the EPA is approving revisions that included, but were not limited to, deletions of provisions that were previously disapproved by the EPA and language regarding water quality based effluent levels being used to determine compliance with the phosphorus criteria for dischargers.

We would like to commend you and your staff for your continued efforts in environmental protection for the State of Florida. Should you have any questions regarding the EPA's action today, please contact me at (404) 562-9469 or have a member of your staff contact Dr. Katherine Snyder, Florida Water Quality Standards Coordinator at (404) 562-9840.

Sincerely,

Mary S. Walker
Director
Water Protection Division

Enclosure

cc: Mr. Robert Williams, FDEP

Decision Document of the United States Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act Review of Florida's Amended Rule 62-302.540

In a letter dated June 1, 2017 from Frederick L. Aschauer, Jr., General Counsel for Florida Department of Environmental Protection (FDEP or the Department), to Ms. Anne Heard, Acting Regional Administrator of the EPA's Region 4 Office, FDEP submitted revised water quality standards for review by the U.S. Environmental Protection Agency pursuant to section 303(c) of the Clean Water Act (CWA or Act). In the June 1, 2017 letter, the General Counsel certified that the water quality standards revisions were duly adopted pursuant to Florida law. These revised water quality standards are in Rule 62-302.540 of the Florida Administrative Code (F.A.C.) [Surface Water Quality Standards]. As discussed more fully below, where the EPA has determined that amendments to Rule 62-302.540 are water quality standards, the EPA has reviewed and approved those revisions pursuant to section 303(c) of the CWA.¹

Clean Water Act Requirements

Section 303 of the CWA, 33 U.S.C. § 1313, requires states to establish water quality standards and to submit any new or revised standards to the EPA for review and approval or disapproval. The EPA's implementing regulations require states to adopt water quality criteria that protect the designated use. See Title 40 of the Code of Federal Regulations (40 C.F.R.) part 131.11(a). Such criteria must be based on a sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. In addition, the EPA's regulations require that in establishing criteria, a state shall consider water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of water quality standards of downstream waters. See 40 C.F.R. 131.10(b). A state's submission of water quality criteria must include (1) the methods used and analyses conducted to support water quality standards revisions, (2) water quality criteria sufficient to protect the designated uses, and (3) a certification by the State Attorney General or other appropriate legal authority within the state that the water quality standards were duly adopted under state law. See 40 C.F.R. 131.6.

Endangered Species Act Requirements

In addition to the EPA's review under section 303 of the CWA, section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS), to ensure that their actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species. Most of the revisions to the "Water Quality Standards for Phosphorus Within the Everglades Protection Area" (Phosphorus Rule or Rule)² are deletions to reflect previous disapprovals by the EPA. Those previously disapproved provisions have not been in effect for CWA purposes. Subsection 62-302.540(5) has been revised to provide that discharges meeting a water quality based effluent limit (WQBEL) will be considered in attainment with the phosphorus criterion. This revision does not change the standard or level of protection offered to listed species or critical habitat. WQBELs are a method used by the state to implement a standard. With regard

¹ The EPA has provided FAQs on "What is a New or Revised Water Quality Standard Under CWA 303(c)(3)?" at <http://water.epa.gov/scitech/swguidance/standards/cwa303faq.cfm>. The link provides detailed information of such analysis.

² FDEP also submitted Florida's Amended Everglades Forever Act (EFA), which was also subject to EPA review and associated litigation. Because EPA's current action is based only on its review of the State's revised Phosphorus Rule, only actions and decisions regarding that Rule are described in this document.

to consultation activities for section 7 of the ESA, the EPA Region 4 concluded that the water quality standards the Agency is approving in this document would have no effect on threatened and endangered species or their designated critical habitat.

Background

In 2005, FDEP submitted to the EPA for review under the CWA provisions of the Phosphorus Rule (62-302.540, F.A.C.). The Rule established a numeric water quality criterion for phosphorus as well as implementing provisions for the numeric criterion within the Everglades Protection Area. In 2005 and 2006, the EPA issued a series of decisions approving certain provisions of the Phosphorus Rule and concluding that other provisions were not new or revised water quality standards and did not require the EPA's approval or disapproval under CWA section 303(c).³

Environmental and Native American plaintiffs challenged the EPA's 2005 and 2006 decisions regarding the Phosphorus Rule. In 2008, the U.S. District Court for the Southern District of Florida upheld in part and remanded in part the EPA's decisions.⁴ The Court upheld the EPA's 2005 approval of the Phosphorus Rule's numeric phosphorus criterion and the "four-part" test for determining attainment of the criterion. The Court overturned the EPA's decision that certain implementing provisions of the Phosphorus Rule were not new or revised water quality standards, finding that some of those provisions did constitute water quality standards. The Court also overturned the EPA's approval of other provisions of the Phosphorus Rule, finding the EPA's approval to be arbitrary and capricious. The Court remanded the case to the EPA to take further action consistent with the Court's decision.

On December 3, 2009 the EPA issued a new Determination in response to the Court's remand. Consistent with the Court's 2008 decision, the EPA reviewed under CWA section 303(c) those provisions of the Phosphorus Rule that the Court found were new or revised standards. The EPA also reconsidered provisions where the Court held EPA's prior approval of those provisions was invalid. Consistent with the Court's decision, the EPA disapproved certain provisions of the Phosphorus Rule in December of 2009.

Plaintiffs challenged the EPA's December 2009 Determination, alleging, in part, that the EPA failed to (1) specify the changes that Florida must make to the Phosphorus Rule to bring it into compliance with the CWA and (2) commit to promulgate if the State failed to act. The Court remanded the EPA's 2009 Determination and ordered the EPA to issue an Amended Determination (AD) by September 3, 2010.⁵ While the Court did not take issue with EPA's disapprovals, the Court nevertheless ordered that the EPA's AD "shall specifically direct the State of Florida to correct deficiencies in the . . . Phosphorus Rule that have been invalidated." The Court attached to its order copies of the Rule with strikeout markings indicating the exact language that the EPA was to direct the State to remove from the Rule in order the correct the deficiencies. The Court ordered that in the AD, "EPA shall require the State of Florida to commence and complete rulemaking for the Phosphorus Rule within 120 days from the date

³ Determination under section 303(d) of the CWA, Review of Quality Standards for Phosphorus Within the Everglades Protection Area, EPA, January 24, 2005; Determination Regarding Florida Administrative Code Chapter 62-302.540, Water Quality Standards for Phosphorus Within the Everglades Protection Area, EPA, May 8, 2006; Review of F.A.C. 62-302.540(5)(d), Water Quality Standards for Phosphorus Within the Everglades Protection Area under section 303(c) of the CWA, EPA, May 31, 2006.

⁴ Miccosukee Tribe of Indians & Friends of the Everglades v. U.S. Environmental Protection Agency, Florida Department of Environmental Protection, et al., No. 04-21488-CIV-Gold/McAilely (S.D. Fla.)(2008 Order).

⁵ Miccosukee Tribe of Indians v. United States, 706 F. Supp. 2d 1296. (2010 Order).

of the Amended Determination". The Court further ordered that "[i]n the event the State of Florida fails to timely act, the EPA shall provide timely notice, and the EPA Administrator shall promulgate such standard[s] pursuant to 33 U.S.C. 1313(c)."

Consistent with the Court's 2010 Order, the EPA prepared an Amended Determination dated September 3, 2010. The AD directed the State of Florida to correct deficiencies in the Phosphorus Rule and Amended EFA. The AD included as attachments copies of the Phosphorus Rule and EFA with strikeout markings indicating the language changes the Court had identified as necessary to meet CWA requirements. The EPA's AD stated that if FDEP did not finalize revisions to the Rule by January 1, 2011, then the EPA would initiate rulemaking to promulgate the necessary changes consistent with the Court's Order.

Although FDEP initiated a rulemaking to adopt the necessary revisions to the Phosphorus Rule consistent with the EPA's AD with a notice of Rule development published on March 26, 2010 the State rulemaking agencies did not complete that process on the Phosphorus Rule changes by January 1, 2011. Multiple parties filed a petition in the state administrative process challenging FDEP's Rule in October 2010. The Florida Legislature also did not introduce or enact any amendments to the EFA consistent with the EPA's AD. Therefore, the EPA proceeded, consistent with the Court's Order and the EPA's AD, to promulgate federal rulemaking identifying the necessary changes to the Phosphorus Rule and EFA to meet CWA requirements. 77 Fed. Reg. 46303. In its rulemaking, the EPA identified those provisions that were struck from the state Rule and, therefore, were not applicable water quality standards under the CWA. The EPA did not federally promulgate those provisions of the Rule previously approved by the Agency under section 303(c) of the CWA, as those provisions were and remain applicable state promulgated water quality standards under the Act.

Since that time, FDEP has worked to revise the Phosphorus Rule. The administrative challenges filed in 2010 were settled and the petitions were dismissed in February 2017, after the parties agreed to the Phosphorus Rule revisions currently before the EPA. On March 28, 2017 FDEP finalized revisions to the Rule, including revisions based on the changes identified as necessary in the EPA's AD. Those revisions become effective under state law on March 28, 2017. On June 1, 2017 the State submitted those revisions to the EPA for review under section 303(c) of the CWA.

The EPA's Decision Summary

Most of the substantive revisions to the Phosphorus Rule revisions submitted by FDEP are deletions of provisions that were previously disapproved by the EPA, with the exception of revisions to 62-302.540(1) and 62-302.540(5)(a). As set out more fully below, these revisions meet the requirements of the CWA and are approved by the EPA pursuant to section 303(c) of the Act.

Revisions to Chapter 62-302.540⁶ Surface Water Quality Standards

62-302.540 Water Quality Standards for Phosphorus Within the Everglades Protection Area.

(1) Purpose and Scope. The water quality standards adopted by this rule include all of the following elements:

⁶ Unless otherwise stated, all rule and subsection citations are to provisions in the Florida Administrative Code.

~~(a) The purpose of this rule is to implement the requirements of the Everglades Forever Act by utilizing the powers and duties granted the Department under the Act and other applicable provisions of Chapter 373 and 403, F.S., to establish water quality standards for phosphorus, including a numeric phosphorus criterion, within the EPA.~~

~~(b) The water quality standards adopted by this rule include all of the following elements:~~

~~(a) 1. No change.~~

~~2. Establishment of moderating provisions for permits authorizing discharges into the EPA in compliance with water quality standards, including the numeric phosphorus criterion; and~~

~~(b) 3. No change.~~

~~(2) Findings.~~

~~(a) No change.~~

~~(b) Best Management Practices (BMPs) have reduced phosphorus loads from the Everglades Agricultural Area to the EPA by more than twice the amount required by existing rules. Stormwater Treatment Areas (STAs) have reduced phosphorus concentrations to less than the goal of 50 ppb established in the Everglades Forever Act.~~

~~(c) While a significant percentage of the EPA currently meets the numeric phosphorus criterion, further efforts are required to achieve the criterion in the remaining impacted areas of the EPA.~~

~~(d) Even as water quality continues to improve, restoration will be a long-term process because of historic phosphorus accumulations found in sediments within impacted areas. This phosphorus can diffuse back into the water column, a phenomenon the Department recognizes as reflux.~~

~~(e) The Basin-Specific Feasibility Studies completed by the District considered environmental factors, implementation cost, scheduling, and technical factors in evaluating measures to reduce phosphorus levels entering the EPA. These studies and other information provided to the Commission show that:~~

~~1. At this time, chemical treatment technology is not cost-effective for treating discharges entering the EPA and poses the potential for adverse environmental effects.~~

~~2. Optimization of the existing STAs, in combination with BMPs, is currently the most cost-effective and environmentally preferable means to achieve further phosphorus reductions to the EPA, and to restore impacted areas. The effectiveness of such measures should be determined and maximized prior to requiring additional measures. Optimization shall take into consideration viable vegetative technologies, including Periphyton-based STAs that are found to be cost-effective and environmentally acceptable.~~

~~(f) The District and the Department recognize that STA and BMP optimization requires a sustained commitment to construct, implement, stabilize and measure phosphorus reduction benefits.~~

~~(b) (g) No change.~~

~~(h) The Long-Term Plan constitutes a comprehensive program to optimize the STAs and BMPs to achieve further phosphorus reductions and thereby accomplish implementation of Best Available Phosphorus Reduction Technology (BAPRT).~~

~~(i) through (k) renumbered (c) through (e) No change.~~

(4) ~~The Commission finds that this rule must incorporate a flexible approach towards the application of the numeric phosphorus criterion for phosphorus in order to guide the implementation of phosphorus reductions in the Everglades Protection Area. Chapter 403, F.S., the Everglades Forever Act and U.S. Environmental Protection Agency regulations set forth at 40 CFR Part 131 include general policies that authorize such flexibility under appropriate circumstances, including those described in paragraphs (e) through (h) and (k) above. The Commission has exercised this authority by including in this rule both a numeric interpretation of the phosphorus criterion and the various other standard setting provisions of this rule, including the permitting and moderating provisions.~~

(3) Definitions.

~~(a) "Best Available Phosphorus Reduction Technology" (BAPRT) shall be as defined by Section 373.4592(2)(a), F.S. BMPs shall maintain and, where practicable, improve upon the performance of urban and agricultural source controls in reducing overall phosphorus levels. Agricultural BMPs within the Everglades Agricultural Area and the C-139 Basin shall be in accordance with Chapters 40E-61 and 40E-63, F.A.C. STA phosphorus reductions shall be improved through implementation of optimization measures as defined by Section 373.4592(2)(l), F.S. BAPRT may include measures intended to reduce phosphorus levels in discharges from a single basin or sub-basin, or a program designed to address discharges from multiple basins.~~

~~(b) "Long-Term Plan" shall be as defined by Section 373.4592(2)(j), F.S.~~

~~(c) through (e) renumbered (a) through (c) No change.~~

~~(f) "Optimization" shall be as defined by Section 373.4592(2)(l), F.S.~~

~~(d) (e) No change.~~

~~(h) "Technology-based effluent limitation" or "TBEL" shall be defined in Section 373.4592(2)(p), F.S.~~

~~(e) (i) No change.~~

(4) Phosphorus Criterion.

~~(a) through (c) No change.~~

~~(d) Achievement of the Criterion in WCA-1, WCA-2 and WCA-3.~~

~~1. No change.~~

~~2. Achievement of the criterion shall be determined based on data collected monthly from the network of monitoring stations in the impacted area. Impacted Areas of the water body will have achieved the criterion if the five-year geometric mean averaged across all stations is less than or equal to 10 ppb. In order to provide protection against imbalances of aquatic flora or fauna, the following provisions must also be met:~~

~~a. through b. No change.~~

~~c. The annual geometric mean at all individual stations is less than or equal to 15 ppb. Individual station analyses are representative of only that station.~~

~~If these limits are not met, no action shall be required, provided that the net improvement or hydropattern restoration provisions of subsection (6) below are met. Notwithstanding the definition of Impacted Area in subsection (3), individual stations in the network shall be deemed to be unimpacted for purposes of this rule if the five-year geometric mean is less than or equal to 10 ppb and the annual geometric mean is less than or equal to 15 ppb.~~

(c) through (f) No change.

(5) Long-Term Compliance Permit Requirements for Phosphorus Discharges into the EPA.

~~(a) In addition to meeting all other applicable permitting criteria, an applicant must provide reasonable assurance that the discharge will comply with state water quality standards as set forth in this section.~~

~~(a) (b) Phosphorus discharge levels~~ Discharges into the EPA shall be deemed in compliance with this rule state water quality standards upon a demonstration that: those levels in the discharges will be at or below a water quality based effluent limit calculated pursuant to Chapter 62-650, F.A.C., to achieve the phosphorus criterion set forth in this rule.

~~1. Phosphorus levels in the discharges will be at or below the phosphorus criterion set forth in this rule; or~~

~~2. Discharges will not cause or contribute to exceedences of the phosphorus criterion in the receiving waters, the determination of which will take into account the phosphorus in the water column that is due to reflux; or~~

~~3. Discharges will comply with moderating provisions as provided in this rule.~~

(b) (e) No change.

~~(d) Discharge limits for permits allowing discharges into the EPA shall be based upon TBELs established through BAPRT and shall not require water quality based effluent limitations through 2016. Such TBELs shall be applied as effluent limitations as defined in subsection 62-302.200(10), F.A.C.~~

~~(6) Moderating Provisions. The following moderating provisions are established for discharges into or within the EPA as a part of state water quality standards applicable to the phosphorus criterion set forth in this rule:~~

~~(a) Net Improvement in Impacted Areas:~~

~~1. Until December 31, 2016, discharges into or within the EPA shall be permitted using net improvement as a moderating provision upon a demonstration by the applicant that:~~

~~a. The permittee will implement, or cause to be implemented, BAPRT, as defined by Section 373.4592(2)(a), F.S., and further provided in this section, which shall include a continued research and monitoring program designed to reduce outflow concentrations of phosphorus; and~~

~~b. The discharge is into or within an impacted area.~~

~~2. BAPRT shall use an adaptive management approach based on the best available information and data to develop and implement incremental phosphorus reduction measures with the goal of achieving the phosphorus criterion. BAPRT shall also include projects and strategies to accelerate restoration of natural conditions with regard to populations of native flora or fauna.~~

~~3. For purposes of this rule, the Long-Term Plan shall constitute BAPRT. The planning goal of the Long-Term Plan is to achieve compliance with the criterion set forth in subsection (4) of this rule. Implementation of BAPRT will result in net improvement in impacted areas of the EPA. The Initial Phase of the Long-Term Plan shall be implemented through 2016. Revisions to the Long-Term Plan shall be incorporated through an adaptive management approach including a Process Development and Engineering component to identify and implement incremental optimization measures for further phosphorus reductions.~~

~~4. The Department and the District shall propose amendments to the Long-Term Plan as science and environmental conditions warrant. The Department shall approve all amendments to the Long-Term Plan.~~

~~5. As part of the review of permit applications, the Department shall review proposed changes to the Long-Term Plan identified through the Process Development and Engineering component of the Long-Term Plan to evaluate changes necessary to comply with this rule, including the numeric phosphorus criterion. Those changes which the department deems necessary to comply with this rule, including the numeric phosphorus criterion, shall be included as conditions of the respective permit or permits for the structures associated with the particular basin or basins involved. Until December 31, 2016, such permits shall include technology-based effluent limitations consistent with the Long-Term Plan.~~

~~(b) Hydropattern Restoration. Discharges into or within unimpacted areas of the EPA shall be permitted for hydropattern restoration purposes upon a demonstration by the applicant that:~~

~~1. The discharge will be able to achieve compliance with the requirements of sub-subparagraph (6)(a)1.a. above;~~

~~2. The environmental benefits of establishing the discharge clearly outweigh the potential adverse impacts that may result in the event that phosphorus levels in the discharge exceed the criterion; and~~

~~3. The discharge complies with antidegradation requirements;~~

~~(c) Existing Moderating Provisions. Nothing in this rule shall eliminate the availability of moderating provisions that may otherwise exist as a matter of law, rule or regulation.~~

~~(7) through (8) renumbered (6) through (7) No change.~~

~~Rulemaking Specific Authority 373.043, 373.4592, 403.061 FS. Law Implemented 373.016, 373.026, 373.4592, 403.021(11), 403.061, 403.201 FS. History—New 7-15-04, Amended 5-25-05,_____.~~

1. Deletions to Phosphorus Rule to ensure consistency with the EPA's Clean Water Act determination

In its 2010 Amended Determination, the EPA directed the FDEP to make changes to the state Phosphorus Rule as identified in Appendix E of the Determination. Appendix E identified text that the Court, in its 2010 Order, required be deleted from the Rule. When the State agencies did not complete the rulemaking process to revise the Rule consistent with Appendix E, the EPA promulgated federal rulemaking to implement the changes ordered by the Court, 77 Fed. Reg. 46303.

The revisions to the Phosphorus Rule submitted by FDEP in 2017 implement the changes directed by the EPA in the AD as necessary for the Rule to be consistent with the requirements of the CWA. Therefore, the EPA is approving those deletions under section 303(c) of the CWA. The EPA is also approving as non-substantive revisions the addition of introductory text to 62-302.540(1) and the

resulting renumbering of the Phosphorus Rule. The EPA's approval of these non-substantive revisions does not re-open the EPA's prior approvals of underlying substantive water quality standards.

2. Revision to 62-302.540(5)(a)

(a) (b) Phosphorus discharge levels Discharges into the EPA shall be deemed in compliance with this rule state water quality standards upon a demonstration that: those levels in the discharges will be at or below a water quality based effluent limit calculated pursuant to Chapter 62-650, F.A.C., to achieve the phosphorus criterion set forth in this rule.

~~4. Phosphorus levels in the discharges will be at or below the phosphorus criterion set forth in this rule; or~~

Section 62-302.540(5)(a) revises Florida's water quality standards to provide that discharges into the EPA will be deemed in compliance with the Phosphorus Rule where those discharges comply with a water quality based effluent limit (WQBEL) calculated under FDEP rules. Currently, section 62-302.540(5)(a) provides only one option for acceptable effluent limitations, that is that phosphorus levels in the discharges must be at or below the phosphorus criterion established in the Phosphorus Rule. The EPA previously approved section 62-302.540(5)(a) as a new or revised water quality standard, since such effluent limitations would prevent a permitted discharge from causing or contributing to a violation of the phosphorus criterion. This approval does not mean, however, that different effluent limitations would not also protect water quality standards in the Everglades Protection Area.

One of the primary programs for implementing water quality standards is the CWA's National Pollutant Discharge Elimination System (NPDES) program. The CWA and its implementing regulations require that discharge limits in NPDES permits be set at levels that attain water quality standards in the water receiving the discharge (see CWA section 301(b)(1)(C) and 40 C.F.R. § 122.44(d)(1) and (5)). When developing discharge limitations, the permitting authority first considers appropriate technology-based permit effluent limits (TBELs). TBELs require a minimum level of treatment of pollutants for point source discharges based on available treatment technologies. Where TBELs are not adequate to ensure that the receiving water attains water quality criteria applicable to the waterbody, additional discharge limits are developed as necessary to protect the applicable criteria. Section 62-650.300(3)(b). These limits are known as WQBELs. The EPA recommends that permitting authorities use technical processes that translate underlying water quality criteria into defensible, enforceable and protective WQBELs (USEPA 1996) and recognizes that such WQBELs may differ from the underlying water quality criterion while still protecting the receiving water.

FDEP's procedure for developing WQBELs for permitted or proposed wastewater dischargers is set out in Chapter 62-650. FDEP's rules define a WQBEL as an effluent limitation that is necessary to ensure that water quality standards in a receiving body of water will be attained. Section 62-650.200(14). FDEP's WQBEL process determines the levels of nutrients in a point source discharge (i.e., effluent nutrient limits) that attain water quality standards such as the Phosphorus Rule. Florida's wastewater permitting process puts the burden on the applicant to provide all of the necessary documentation for permit issuance, including demonstrating that their discharge will not cause violations of the water quality standards. Section 62-620.320. A new or expanded discharge would need to conduct water quality modeling during critical conditions to provide the reasonable assurance that the discharge will not cause a violation of water quality standards during critical conditions. WQBELs are subject to change upon permit renewal as necessary to ensure water quality standards are protected.

FDEP's WQBEL procedures also include a public process. The public may submit comments to FDEP regarding draft permits or request a public hearing. See section 62-620.555. A person whose substantial interests are affected by a proposed permit may also petition for an administrative hearing to challenge FDEP's decision under sections 120.569 and 120.57, Florida State Statutes. Where WQBELs are developed as part of the NPDES permitting process, the CWA provides the EPA discretion to review those permitting decisions.

As set out above, the state WQBEL Rule requires discharge limitations in NPDES permits that are sufficient to protect water quality standards. The EPA believes it is appropriate to allow FDEP to develop WQBELs that protect the criteria established in the Phosphorus Rule, regardless of whether those WQBELs set limits that are themselves at or below the concentrations established in the Rule. Such WQBELs will ensure that the Phosphorus Rule is attained and will protect designated uses in the Everglades. The EPA has determined that the revisions to 62-302.540(5)(a) are consistent with 40 C.F.R. part 131 and the CWA and the revisions are approved by the EPA pursuant to section 303(c) of the Act.

Conclusion

Based on the reasons outlined above, the EPA concludes that the state of Florida's new or revised water quality standards meet the requirements of the CWA and 40 C.F.R. part 131. The revised criteria addressed in this Decision Document are approved by the EPA pursuant to section 303(c) of the Act.

APR 30 2018

Date



Mary S. Walker
Director, Water Protection Division